LIBRARY
SUPREME COURT, U. S.
FILED
JAN 5 1973
MICHAEL RODAK, JR., CLERK

No. 72-702

In the Supreme Court of the United States

OCTOBER TERM, 1972

GOLDEN STATE BOTTLING COMPANY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530,

PETER G. NASH,
General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COMEN,
Assistant General Counsel,
WILLIAM H. DuROSS, III,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
A. Background	2
B. The present proceeding	3
Argument	6
Conclusion	12

CITATIONS

Cases:

Brown v. *National Labor Relations Board*, 462 F. 2d 699	11
Int'l Association of Machinists, District Lodge 94 v. *National Labor Relations Board*, 414 F. 2d 1135, certorari denied, 396 U.S. 889	10
John Wiley & Sons v. *Livingston*, 376 U.S. 543	7, 8, 11
National Labor Relations Board v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234	10, 11
National Labor Relations Board v. *Burns*, 406 U.S. 272	6, 7, 8, 11
National Labor Relations Board v. *Colten*, 105 F. 2d 179	7
National Labor Relations Board v. *Lunder Shoe Corp.*, 211 F. 2d 284	11
National Labor Relations Board v. *Seven-Up Bottling Co.*, 344 U.S. 344	11
Perma Vinyl Corp., 164 NLRB 968	5, 8, 10
Regal Knitwear Co. v. *National Labor Relations Board*, 324 U.S. 9	10

Cases—Continued

	Page
Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 265	9
U.S. Pipe & Foundry Co. v. *National Labor Relations Board*, 398 F. 2d 544	10
United Automobile Workers v. *National Labor Relations Board*, 442 F. 2d 1180	10
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	7

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*)	2
Section 8(a)(1)	2
Section 8(a)(3)	2
Section 8(d)	8
Section 10(c)	8

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-702

GOLDEN STATE BOTTLING COMPANY, INC., ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32–36) is reported at 467 F. 2d 164. The decision and order of the National Labor Relations Board (Pet. App. 1–31) are reported at 187 NLRB No. 142.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37–38) was entered on August 21, 1972. The petition for a writ of certiorari was filed on November 8, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

402-343—73

QUESTIONS PRESENTED

1. Whether a successor employer who takes over its predecessor's business with knowledge that the predecessor has discharged an employee in violation of the National Labor Relations Act may be required to remedy that unfair labor practice by reinstating the employee with backpay.

2. Whether the Board properly determined the amount of backpay due the unlawfully discharged employee.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. App. 39–44.

STATEMENT

A. BACKGROUND

On June 10, 1964, the Board found that Golden State Bottling Co., Inc. (hereafter "Golden State" or "the predecessor"), violated Section 8(a)(3) and 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(3) and (1), by discharging Kenneth L. Baker, a driver-salesman, because of his prounion activities. The Board ordered Golden State and its officers, agents, successors, and assigns to offer Baker immediate and full reinstatement to his former or a substantially equivalent position and to make him whole for any loss of earnings from the date of his discharge to the date of his reinstatement. 147 NLRB 410. On December 2, 1965, the court below enforced

the Board's order with respect to Baker, 353 F. 2d 667.[1]

Several months after the Board's decision, Golden State decided to convert its driver-salesmen to distributors. On October 1, 1964, Golden State offered the first distributorship contract to Donald Thorne, who, in Baker's absence, was its best driver-salesman (R. 119; Tr. 115, 117, 209). By January 31, 1968, Golden State had converted 12 of its 18 salesmen to distributors (R. 119–120; Tr. 117–118, 121–122; GCX 18b). On that date, Golden State sold the Bottling Company and transferred all of its assets to All American Beverages, Inc. (hereafter "All American" or "the successor") as a going concern (R. 113, 115; Tr. 44–45, 77–79, 60–61; GCX 15a, 15b).[2]

B. THE PRESENT PROCEEDING

On September 30, 1969, the Board's Regional Director instituted proceedings to determine the amount of backpay due Baker. On December 19, 1969, the Director, having learned of the sale to All American, added the latter company to the proceeding on the theory that it was a successor to Golden State within the meaning of the Board's order. (Pet. App. 2–3.)

---

[1] However, due to the court's delay in disposing of the Board's petition for rehearing on a portion of the court's decision wholly unrelated to Baker, a final decree was not entered until November 27, 1968 (R. 111–112).

"R." refers to the materials contained in Volume I Pleadings, "Tr." refers to the stenographic transcript of testimony, and "GCX" to the General Counsel's exhibits.

[2] The Board found that All American was a bona fide purchaser for value of the bottling company (Pet. App. 8).

Based upon the evidence adduced at this supplemental hearing, the Board, adopting the decision of the Trial Examiner, made the following findings and conclusions:

All American was a successor employer to Golden State, within the meaning of the Act (Pet. App. 8, 9), since All American, on and after January 31, 1968, had continued the business without cessation or hiatus, and without changing the method of operation or the plant (Pet. App. 8–9; Tr. 124–125, 135–136, 251, 274). All American hired all of the Golden State's supervisory and managerial personnel, as well as all but 2 or 3 of Golden State's 50 employees (Pet. App. 9; Tr. 100–101, GCX 16(b)). The 12 Golden State distributors assigned their contracts to All American and continued distributing the same bottling products to the same customers (Pet. App. 9; Tr. 95–100). Eugene Schilling, secretary of Golden State and general manager of the bottling operation, became the general manager and "president" of the Bottling Division of All American (Pet. App. 5–6; Tr. 170, 45, 86, 136–137).

The Board further found that All American had knowledge at or before the date of transfer of the underlying unfair labor practice proceeding involving Golden State (Pet. App. 16–17). The Board relied on the fact that none of the officials of All American appeared as witnesses during the hearing to deny knowledge, nor was their absence explained (Pet. App. 13, 16). Moreover, the Board, accepting the Trial Examiner's ruling, discredited the denials of

Schilling[3] and Golden State President Edwin Crofoot that they did not advise All American of the Board's unfair labor practice findings prior to the transfer (Pet. App. 13, 16).[4]

The Board followed its earlier decision in *Perma Vinyl Corp.*, 164 NLRB 968, where it held that, in the foregoing circumstances, a successor was responsible for remedying his predecessor's unlawful conduct (Pet. App. 10). It issued a supplemental order requiring Golden State and All American, jointly and severally, to pay Baker $16,497, with interest, as net backpay due for the period ending December 31, 1968, plus an undetermined amount of backpay from January 1, 1969, to the date a valid offer of reinstatement is made to Baker by All American (Pet. App. 29).

---

[3] All American hired Schilling as its general manager on the date it took over from Golden State. While working for Golden State, Schilling had been responsible for the unlawful discharge of Baker. 147 NLRB at 418.

[4] The Examiner noted that Schilling and Crofoot had attempted to conceal the transfer to All American from both the Board and the court of appeals (Pet. App. 13–14). He further found that, while Crofoot testified that he had "forgotten" about the unfair labor practice case when asked by All American concerning pending litigation, Crofoot was responsible for settling all legal matters involving Golden State, and he had authorized the payment of substantial legal fees in connection with that case (Pet. App. 14–15; Tr. 46, 48). Finally, the Examiner found that, while both Schilling and Crofoot testified that Schilling played no part in the sale negotiations, he in fact participated in at least one of the negotiating sessions, met with All American about the terms of continuing his own employment, and executed the sales contract as secretary of Golden State (Pet. App. 15; Tr. 130–134, 134–138; GCX 15(b), p. 11).

The amount of Baker's backpay consisted of what he would have earned as a driver-salesman from August 16, 1963, the date of his discharge, to October 1, 1964, plus earnings as a distributor after October 1, 1964.[5] The Board found that, but for the unlawful discrimination against him, Baker would have been offered, and would have accepted, a distributorship contract on October 1, 1964 (Pet. App. 19–20; Tr. 231). The Board calculated Baker's earnings as a distributor from the earnings of Donald Thorne, the employee most comparable to Baker in total sales prior to Baker's unlawful discharge (Pet. App. 21–23).

The court of appeals, one judge dissenting, sustained the Board's findings and conclusions and enforced its backpay order (Pet. App. 32–36).

ARGUMENT

1. Petitioners do not contest the finding of the Board, sustained by the court below, that All American, the purchaser, continued the Golden State business in essentially the same form, and that thus, under the principles enunciated in *National Labor Relations Board* v. *Burns*, 406 U.S. 272, 279–281, All American is a successor employer for purposes of the National Labor Relations Act. Petitioners contend (Pet. 15–29),

[5] The Board found that Schilling's December 1968 offer, on behalf of Golden State, to reinstate Baker as a driver-salesman was invalid, since Baker was entitled to reinstatement as a distributor. The Board also found that Schilling had no authority to act for Golden State after the January 1968 transfer, and that Golden State no longer employed any driver-salesmen. (Pet. App. 24–25.)

however, that the Board lacks authority to require a successor to reinstate with backpay an employee wrongfully discharged by the predecessor, even though the Board order which issued prior to the transfer of the business was made applicable to Golden State and its "successors, and assigns" (147 NLRB at 411), and All American had knowledge of the unfair labor practice case before it acquired the business.[6] This issue does not warrant review by this Court.

In *Burns*, the Court held that a mere change of employers or of ownership does not affect a bargaining obligation imposed by the Act, "where the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a recently certified bargaining agent." 406 U.S. at 281. This holding rests on the principle that "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." *National Labor Relations Board* v. *Colten*, 105 F. 2d 179, 183 (C.A. 6). The same principle—as well as the "objectives of national labor policy, reflected in established principles of federal law"[7]—make it reasonable

---

[6] Insofar as petitioners challenge (Pet. 30–32) the Board's finding (Pet. App. 16–17), which the court below sustained (Pet. App. 33), that All American had knowledge of the Board unfair labor practice litigation before it acquired the business, this merely presents an evidentiary issue which does not, by itself, warrant further review. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496. In any event, the factors enumerated by the Board and the court below amply support the Board's finding.

[7] As the Court stated in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 549: "The objectives of national labor policy, re-

to interpret the broad grant of remedial authority conferred on the Board by Section 10(c) of the Act,[8] as empowering it to require "one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his * * * predecessor [to remedy] his predecessor's unlawful conduct." *Perma Vinyl Corp.*, 164 NLRB at 969. As the Board explained in that case (*ibid.*):

> When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the vic-

---

flected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."

Although the Court did not find *Wiley*, which arose in the context of a suit under Section 301 of the Labor Management Relations Act to compel arbitration, controlling in the circumstances presented in *Burns*, it was not because it deemed the foregoing statement of policy inapposite for purposes of the National Labor Relations Act. In *Burns*, the Court simply held that the "freedom of contract" policy reflected in Section 8(d) of the National Labor Relations Act militated against imposing on a successor employer a duty, not only to bargain with the union representing the predecessor's employees, but to honor the predecessor's collective bargaining agreement.

[8] Section 10(c), 29 U.S.C. 160(c), empowers the Board, upon finding that a person has engaged in an unfair labor practice, to issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act."

tims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practices are to be erased and all employees reassured of their statutory rights. And it is the successor who has taken over control of the business who is generally in the best position to remedy such unfair labor practices most effectively. The imposition of this responsibility upon even the bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter which can be reflected in the price he pays for the business, or he may secure an indemnity clause in the sales contract which will indemnify him for liability arising from the seller's unfair labor practices.[9]

---

[9] In the present case, Golden State President Crofoot agreed to indemnify All American for any liability arising from the Board proceeding (Pet. App. 15; Tr. 70–74). In view of this indemnity agreement, the court below correctly concluded (Pet. App. 33–34) that it was unnecessary to consider in this case whether the joint liability which the Board imposed on Golden State for backpay accruing after the transfer to All American would otherwise have been within the Board's power (Pet. 20–23). Moreover, contrary to petitioners' suggestion, the Board's order (Pet. App. 29) does not impose any reinstatement obligation upon Golden State.

Textile Workers v. *Darlington Mfg. Co.*, 380 U.S. 265, is inapposite. That case involved the close down of a business, and the Court specifically stated: "We * * * are not confronted with a sale of a going concern, which might present different considerations under §§ 8(a)(3) * * * [of the Act]" (*id.* at 272, n. 14).

The court below thus correctly sustained the Board's application of its *Perma Vinyl* doctrine in this case. Morever, its decision is consistent with that of the Fifth Circuit, the only other court of appeals which so far has had occasion to rule upon that doctrine. *U.S. Pipe & Foundry Co.* v. *National Labor Relations Board,* 398 F. 2d 544 (C.A. 5), enforcing the Board's order in *Perma Vinyl* itself. See also *Int'l Association of Machinists, District Lodge 94* v. *National Labor Relations Board,* 414 F. 2d 1135, 1139, n. 3 (concurring opinion) (C.A. D.C.), certiorari denied, 396 U.S. 889; cf. *United Automobile Workers* v. *National Labor Relations Board,* 442 F. 2d 1180 (C.A. 9). Finally, these decisions are not contrary to *Regal Knitwear Co.* v. *National Labor Relations Board,* 324 U.S. 9. Although the Court there stated that the "term 'successors and assigns' in an enforcement order * * * may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure," it added that "in appropriate circumstances" the order could be "enforced against those to whom the business may have been transferred, whether as a means of evading the judgment *or for other reasons,*" and that the answer depended upon "an appraisal of [the] relations" between "the defendant and the successor" (324 U.S. at 14–15; emphasis added). For the reasons given above, All American has sufficiently aligned itself with the Golden State enterprise to require it to remedy the unfair labor practice committed by that enterprise.[10]

[10] To the extent that *National Labor Relations Board* v. *Birdsall-Stockdale Motor Co.*, 208 F. 2d 234 (C.A. 10), and

2. The court below affirmed the Board's factual findings that, but for the unlawful discharge, Baker would have been offered and would have accepted a distributorship on October 1, 1964, and that thereafter he would have accumulated earnings comparable to those of distributor Donald Thorne (Pet. App. 34–35). In these circumstances, it was appropriate for the Board to include in Baker's backpay award what he would have earned as a distributor. Such inclusion is necessary to restore Baker to the position and earnings he would have attained but for his unlawful discharge on August 16, 1963, and thus "'can fairly be said to effectuate the policies of the Act.'" *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 347.[11]

National Labor Relations Board v. *Lunder Shoe Corp.*, 211 F. 284 (C.A. 1), reflect a contrary view, their authoritative effect is diminished by the fact that they were decided before this Court, in *Wiley* and *Burns*, *supra*, emphasized the importance of protecting employees against changes in ownership of the employing enterprise.

Moreover, in *Birdsall* the successor employer was "adjudged of wrongdoing on its part without complaint, notice, full opportunity to present its defense and the other essential requirements of due process" (208 F. 2d at 237). Here, on the other hand, All American was made a party to the Board's backpay proceeding and was afforded a full opportunity, which it took, to contest the application to it of the Board's supplemental order (Pet. App. 2–3).

[11] Contrary to petitioners' contention (Pet. 39), the Board did not find that Golden State's distributors were "independent contractors." It held that it was unnecessary to resolve this question, since the unlawful discharge of Baker occurred while he was an employee (Pet. App. 20–21; see also Pet. App. 34). Petitioners' reliance upon *Brown* v. *National Labor Relations Board*, 462 F. 2d 699 (C.A. 9), is thus misplaced.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
PATRICK HARDIN,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
WILLIAM H. DUROSS, III,
Attorney,
National Labor Relations Board.
JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1972